# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1566

MONROE AUTO EQUIPMENT COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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1. In July 1964 the Board conducted a representation election among petitioner's employees which the Union[1] lost (Pet. App. 21). Thereafter, the Board set the election aside on objections by the Union, and ordered a second election (Pet. App. 21). In a subsequent unfair labor practice case, the court of ap-

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

peals approved the Board's findings that petitioner, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, discriminated against two employees who had served as the Union's observers at the first election by transferring and later discharging one and by suspending the other. *National Labor Relations Board* v. *Monroe Auto Equipment Co.*, 392 F.2d 559 (C.A. 5), certiorari denied, 393 U.S. 934. In March 1966, a second election was conducted, which the Union won (Pet. App. 22). However, petitioner refused to bargain with the Union on the ground that the election was invalid, and that issue is still being litigated.[2]

2. The present proceeding involves the discharge of employee William J. Phillips, an observer for the Union at the second election. Phillips was active in soliciting employee support for the Union, both before and after the election (Pet. App. 16). Following Phillips' appearance as an observer for the Union in the election on March 3-4, 1966, petitioner's supervisors instructed a repairman to report any repairs on Phillips' machines, warned an employee not to "buddy up" with Phillips anymore, and told a fore-

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[2] The Board initially overruled petitioner's objections to the election, certified the Union, and found that petitioner's refusal to bargain violated Section 8(a)(5) and (1). *Monroe Auto Equipment Co.*, 164 NLRB 1051. The court of appeals remanded the case to the Board for a hearing on petitioner's objections to the election. *National Labor Relations Board* v. *Monroe Auto Equipment Co.*, 406 F.2d 177 (C.A. 5). Depending on the outcome of the remand proceeding, petitioner may be ordered to bargain with the Union or a third election may be directed.

man that if he caught Phillips loafing on the job to treat him "like anybody else," and to watch all the union people and "to get rid of them as well as other people if they got out of step, not to be scared to discipline them" (Pet. App. 16, 22-24). Petitioner also began training another employee, Cole, to operate Phillips' machines (Pet. App. 16, 24, 33).

On Friday, April 22, 1966, petitioner notified Phillips that he was being transferred to Cole's job and Cole to his (Pet. App. 16, 24). Phillips, who had received no training on how to operate Cole's machines, protested the transfer (Pet. App. 16-17). He had worked for petitioner more than 5 years, had a good record on the job, without prior warnings or reprimands, and was given no reason for the transfer (Pet. App. 16, 21-22, 28, 33). The following Monday, Phillips reported for work and was ordered to run Cole's rewelding machine (Pet. App. 17, 26). When Phillips refused to accept his new assignment because he thought the transfer so soon after the election was illegally motivated, he was discharged (Pet. App. 33, 30).

The Board found that the transfer of Phillips was in fact motivated by his union activity, and that petitioner thus violated Section 8(a)(3) and (1) of the Act (Pet. App. 33-34).[3] It ordered Phillips reinstated with backpay (Pet. App. 35). The court of

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[3] The Board accepted the subsidiary facts found by the Trial Examiner, but overruled his ultimate conclusion that the transfer was not discriminatorily motivated (Pet. App. 17-18, 28-31, 33).

appeals affirmed the Board's unfair labor practice findings, and enforced its order (Pet. App. 18).

3. Nothing in the decision below supports petitioner's contention that the court was proceeding on the premise, "once guilty always guilty" (Pet. 6). On the contrary, the Court carefully detailed the evidence supporting the finding that petitioner's transfer of Phillips was unlawfully motivated (Pet. App. 16-17). Nor did the court err in viewing the facts of this case against the background of petitioner's previous, similar unfair labor practices (Pet. 18). It is well settled that prior unfair labor practices are relevant in determining the motivation underlying subsequent conduct. See, e.g., *Maphis Chapman Corp.* v. *National Labor Relations Board*, 368 F.2d 298, 303-304 (C.A. 4); *National Labor Relations Board* v. *Harrah's Club*, 403 F.2d 865, 872-873 (C.A. 9), and cases there cited.

The cases cited by petitioner (Pet. 8-12) do not conflict with the decision below. They stand for the proposition that a finding of discriminatory motivation will not be sustained merely because the charged party was previously found guilty of unfair labor practices. But the court of appeals here found that the Board's decision was supported by substantial record evidence of unlawful motivation, and did not rest solely on petitioner's past wrongdoing. That holding is correct (*supra*, pp. 2-3) and, in any event, does not present an issue warranting further review. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502.

4. Nor is there merit to petitioner's contention (Pet. 12-13) that consideration of the prior unfair labor practice proceeding is barred by the limitations period of Section 10(b) of the Act, which prohibits issuance of a complaint based on unfair labor practices occurring more than 6 months prior to the filing of the charge. Section 10(b) does not preclude consideration of prior events to shed light on the motivation for conduct occurring within the limitations period. *Local Lodge No. 1424, International Association of Machinists* v. *National Labor Relations Board*, 362 U.S. 411, 416-417. Moreover, the policies underlying Section 10(b) clearly do not bar judicial notice of facts previously established in timely litigation (*id.* at 419).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1970.

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